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Deborah Widiss

Indiana University Maurer School of Law, dwidiss@indiana.edu

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RECONFIGURING SEX, GENDER, AND THE LAW OF MARRIAGE¹

Deborah A. Widiss

This article brings together legal, historical, and social science research to analyze how couples allocate income-producing and domestic responsibilities. It develops a framework—what I call the marriage equation—that shows how sex-based classifications, (non-sex-specific) substantive marriage law, and gender norms interrelate to shape these choices. Constitutional decisions in the 1970s ended legal distinctions between the duties of husbands and wives but left largely in place both gender norms and substantive rights within marriage, tax, and benefits law that encourage specialization into breadwinning and caregiving roles. By permitting disaggregation of the marriage equation, the new reality of same-sex marriage can serve as a natural experiment that should inform both study design and policy reform.

Key Points for the Family Court Community:

- This article shows that although marriage law no longer explicitly requires wives to provide domestic support and husbands to provide economic support, non-sex-specific aspects of the substantive law continue to encourage couples to specialize into breadwinning and caregiving roles.
- Same-sex marriage can serve as a natural experiment to expose the extent to which substantive marriage law—as opposed to gender norms—may encourage couples to specialize into breadwinning and caregiving roles.
- Research on same-sex marriage can help inform how best to achieve equality within all marriages and what is fair compensation for a dependent spouse in the event of a divorce.

Keywords: *marriage; divorce; same-sex marriage; gender; household labor; work/family; alimony; legal benefits*

I. INTRODUCTION

“It never ceases to amaze me how many people will say to us, ‘So, who’s the woman, and who’s the man, in your marriage?’”

—Jason Shumaker, husband to Paul McLoughlin II²

Traditionally, substantive marriage law aligned sex-based classifications with gender norms. They were collectively coherent and mutually reinforcing, albeit in a way that subordinated women to men. A husband was responsible for financially supporting his wife and a wife owed domestic services to her husband. Divorce law included sex-based differentiation as well; for example, in many states, alimony was available only to wives. In the 1970s, such sex-based distinctions within family law were held to be unconstitutional. The law no longer imposes distinct responsibilities on wives and husbands. Many might therefore assume that current marriage law encourages couples to share breadwinning and caretaking responsibilities equally. Although it is common knowledge that husbands still typically work more hours for pay and wives still shoulder a greater share of domestic responsibilities, this reality is perceived to be the result of individual choices or gender norms that are outside the reach of the law.

This popular view is incorrect. In fact, marriage law and related benefits law still encourages, in a myriad of ways, specialization within marriage into breadwinning and caregiving roles, but now it is formally agnostic regarding which spouse plays which role. Contemporary litigation over marriage rights for same-sex couples—that is, challenges to the last significant sex-based classifications within marriage law—once again reconfigures marriage. The new reality of same-sex marriage does not just advance equality for gays and lesbians; it can also offer a fresh perspective on longstanding debates over how best to achieve equality within marriage for (different-sex and same-sex) couples and what is fair compensation for a dependent spouse in the event of a divorce.

Correspondence: dwidiss@indiana.edu

II. THE MARRIAGE EQUATION

When married couples make decisions regarding how they will share responsibility for income-producing work and domestic obligations, their choices will generally fall on a spectrum bounded at one end by equal sharing of both responsibilities, and at the other by complete specialization. Even if both spouses participate in the labor market, and even if they rely on paid caregivers or other domestic workers to support this work, couples must determine what domestic obligations to “out-source,” which spouse will perform remaining domestic work, and which spouse will modify a work schedule when necessary to meet unexpected domestic needs. This is the negotiation that, for many couples, occurs any time a child is too sick to go to school. Couples who choose to specialize completely into separate breadwinning and caregiving roles, or to prioritize labor market participation by one spouse and domestic work by the other spouse, must also determine which spouse will take on which set of responsibilities. For any given couple, the choices may shift over time, or even vary dramatically on a daily or weekly basis. But their choices are shaped, and sometimes constrained, by societal gender norms and by substantive marriage law, including both any *sex-specific* obligations that are imposed on husbands or wives and *non-sex-specific* structures that can encourage specialization into caregiving and breadwinning roles or, conversely, equal sharing of such responsibilities.

These three factors—sex-based classifications within marriage law, gender norms, and non-sex-specific substantive laws of marriage—collectively form what I call a “marriage equation.” Although these factors are logically distinct, they interrelate. Any individual couple’s choices will be shaped by all three factors, the extent to which the factors reinforce or are in tension with each other, and the couple’s assessment of each factor’s importance. They also relate in a more general sense, in that laws both reflect and shape societal norms in complex ways that are difficult to disentangle. As applied to marriage law, there have been dramatic debates, over time, regarding whether there is a single “optimal” division of responsibilities within marriage; if so, what it is; and further, whether and how the law should encourage or enforce it. In this essay, I am not arguing that any particular allocation is ideal. Rather, I am using the marriage equation framework to articulate more clearly the interaction of these factors and to demonstrate how empirical work can help disaggregate their distinct effects.

III. THE MARRIAGE EQUATION FOR DIFFERENT-SEX COUPLES

Historically, marriage was only available to different-sex couples, and the three factors of the marriage equation collectively expressed and enforced as ideal a marriage in which the husband took on primary or full breadwinning responsibilities and the wife took on primary or full caretaking responsibilities. Long after the demise of coverture, in which a woman’s legal identity was subsumed under her husband upon marriage, family law used explicit sex-based classifications to impose distinct responsibilities on husbands to provide financial support and on wives to provide domestic services.³ Employment laws further reinforced this division, permitting, for example, employers to pay married men more than women performing the same work, in recognition of men’s presumed responsibilities to provide for a family.⁴ (As Henry Ford explained in 1922 when doubling the salary paid to married men, “The man does the work in the shop, but the wife does the work at home. The shop must pay them both.”⁵) The government programs of social insurance, largely developed during the 1930s through the 1950s, likewise used sex-based classifications to meet the needs of this idealized family structure. Upon death or retirement of a spouse, dependent wives, but not husbands, could receive social security benefits, and unemployment insurance provided protection for children of out-of-work fathers but not out-of-work mothers.⁶ Private employment benefits—such as the availability of health insurance for an employee and his spouse and children—facilitated this divide as well. These legal rights were complementary to, and strengthened by, societal norms as expressed in the ideology of separate spheres: men *should* express and prove their masculinity by shouldering the breadwinning responsibilities, and women *should* express and prove their femininity by providing nurturing care and support.

A. THE DEMISE OF (MOST) SEX-BASED CLASSIFICATIONS

In the 1960s and 1970s, the women's movement challenged the legality of sex-based classifications within the marriage equation, as well as the separate spheres ideology that underlay it. Explicit sex discrimination in employment was prohibited by the enactment of the Equal Pay Act of 1963 and Title VII of the Civil Rights of 1964.⁷ In the 1970s, a series of groundbreaking Supreme Court decisions (many litigated by now-Justice-then-ACLU-lawyer Ruth Bader Ginsburg) held that sex-based distinctions within family law were generally unconstitutional.⁸ Congress and state legislatures subsequently stripped most sex-based classifications from family, employment, and benefits law.

These developments changed the marriage equation by removing explicit sex-based classifications (other than the threshold requirement that a man must marry a woman). But they largely left in place the pre-existing architecture of substantive marriage and related benefits law that encourages specialization. Gender norms also changed far less than feminists had expected. Thus, the modified marriage equation left by these legal developments—the equation that persists to this day—does not actually encourage couples to share domestic and income-producing responsibilities equally. Rather, even though the equation no longer explicitly requires husbands and wives to play distinct roles, the combination of substantive marriage law and gender norms still encourages specialization along gendered lines.

B. SUBSTANTIVE MARRIAGE LAW AND GENDER NORMS CONTINUE TO COLLECTIVELY ENCOURAGE SPECIALIZATION

More than 30 years after explicit sex-based classifications in family, employment, and benefits law were held to violate the Constitution or statutory prohibitions on discrimination, the vast majority of different-sex couples still divide responsibilities along gendered lines. Although women now typically share breadwinning responsibility, with 70% of married women with children under 18 participating in the paid labor force,⁹ they still perform far more housework than married men. In 1965, married women spent about seven times as many hours as their husbands on housework; now married women spend about twice as many hours as their husbands on housework.¹⁰ Women working full time also still generally do more childcare than their husbands, although some recent studies suggest that this imbalance is narrowing considerably, particularly among younger men.¹¹ These facts collectively give rise to the reality that Arlie Hochschild has famously described as the “second shift.”¹² Women work significant hours outside the home and then return to significant childcare and housework responsibilities at home. Labor force participation and housework division are only part of the story. Working mothers are far more likely than working fathers to miss work for children's illnesses or when childcare arrangements break down. They are also more likely to forego or transition out of time-intensive or travel-intensive careers when children are born.¹³

A large body of quantitative and qualitative work by social scientists seeks to explain the persistence and pervasiveness of the gendered allocation of breadwinning and caregiving responsibilities. One prominent theory, initially propounded by Gary Becker, focuses on the efficiencies provided by specialization.¹⁴ Becker argued that households, like companies, benefit from a certain level of specialization, and that the aggregate household's well-being will be maximized if one spouse specializes in paid work and the other specializes in caretaking.¹⁵ Other economists postulate that the spouse with greater earning power, still typically the man, will use his extra earning power to “bargain out” of housework.¹⁶ However, several studies have shown that women who earn more than their husbands often still perform a greater share of housework than their husbands. Even more surprisingly, as the gap in their earnings widens, the gap in the housework split also tends to widen.¹⁷ In other words, a woman who far out-earns her husband will tend to do a considerably larger share of the housework than a woman who earns about the same amount as her husband. Social scientists speculate that in relationships in which the woman earns more than the man, both individuals “correct” for the “gender deviance” implicit in their allocation of breadwinning responsibilities by embracing a traditional gendered split regarding household responsibilities.

But gender norms, and what might be characterized as sex-neutral economic factors (which owe much to the historic separate spheres ideology), are not the full story. Substantive marriage law, and tax and benefits laws that incorporate marriage into their structure, *also* continue to encourage specialization into breadwinning and caregiving roles. For example, in the upper tax brackets, federal tax law imposes a “marriage penalty” on married couples who earn relatively comparable amounts, and it provides a “marriage bonus” for couples with a significant disparity in earnings.¹⁸ Additionally, if both members of the couple work outside the home, they pay taxes on the income they earn, including income used to purchase childcare services (other than a limited deduction) or assistance with housework. By contrast, if one member of the couple stays home and provides childcare or housework services himself or herself, the couple pays no tax on the imputed value of such services, further increasing the marriage “bonus” for couples with such specialization.¹⁹ Social security subsidizes caretaking by permitting dependent spouses (formerly explicitly dependent wives) who have not engaged in paid work, and thus have not paid into the social security system at all, to receive benefits based on a spouse’s contributions, in addition to the benefits the working spouse receives himself or herself.²⁰

Although having one spouse opt out of the paid labor market is often conceived of as a “luxury” for the middle class or upper class, two of the most significant government assistance programs for low-income families also encourage a breadwinner-caretaker divide. Welfare law imposes a collective hourly work requirement on two-parent families that is only slightly higher than the requirement applied to single-parent families,²¹ and the Earned Income Tax Credit uses identical or almost identical eligibility standards for single-parent households and dual-parent households.²² Although the vast majority of families served by these programs are single-parent (mostly single-mother) families, married parents who qualify for benefits will typically be well served by specializing into breadwinning and caregiving roles because the value of childcare provided by a parent is not imputed as income, and a second wage income could easily push a family over the eligibility thresholds.²³

The gendered architecture of marriage law also persists—to some extent—in the protections that it provides to a dependent spouse if the relationship comes to an end. In most states, courts have the power to “equitably divide” property acquired during a marriage, regardless of title, and also to order a primary breadwinner to make maintenance or alimony payments to a former spouse after divorce. When resolving disputes over property or spousal support, courts are typically required to consider factors such as the extent to which one spouse has provided care for children or has facilitated the other spouse’s wage-earning, as well as the relative ability of the spouses to support themselves.²⁴ Even though the vast majority of property settlements in divorces are ultimately resolved through private negotiations, dependent spouses, negotiating in the “shadow of the law,” can use these substantive entitlements to strengthen their position.²⁵

Marriage law provides only a partial safety net for a dependent spouse, but it is far greater protection than a dependent cohabitor receives. No court needs to be involved when a cohabiting relationship ends and, if courts do become involved, the legal default is that each individual member of the couple leaves the relationship with the income she earned and any property such income was used to acquire. In other words, a dependent cohabitor who drops out of the workplace to provide domestic support might well have no claim to property or income accumulated by her partner. Even if a dependent cohabitor has the foresight, resources, and bargaining power to contract explicitly with a partner for financial recompense if the relationship unravels, she or he may have no legal recourse because courts in some states refuse to enforce even express contracts between cohabitants.²⁶

Beyond these incentives embedded in the law of marriage, societal and personal understandings of marriage likewise encourage many couples to specialize. A decision to marry is a statement from each member of a couple that they intend to remain in the relationship, ideally for life. Marriage naturally encourages a shift from an individualized focus to a family-based focus for decision making, permitting couples to take advantage of complementary skill sets or interests, or to subordinate immediate interests of one or both members of the couple for expected collective long-term gain. Studies have shown that actual legal rights are an important part of this calculus. For example, several studies have found (somewhat surprisingly) that couples are sufficiently aware of divorce law that changes in the

substantive law—such as greater or lesser protections for a dependent spouse—affect bargaining between spouses and the willingness to invest in marriage-specific capital.²⁷ Exactly how big a role legal rights play is hard to calculate, especially since for different-sex couples these legal incentives align with strong gender norms that also persist. Same-sex marriage can help disaggregate these factors.

IV. THE MARRIAGE EQUATION FOR SAME-SEX COUPLES

A rapidly growing number of states either permit same-sex couples to marry or have created a status, such as a civil union or domestic partnership, that provides all of the state-level legal benefits of marriage.²⁸ Even before New York legalized same-sex marriage in the summer of 2011, researchers estimated that approximately 50,000 same-sex couples in this country had married, and that another 85,000 same-sex couples had entered into civil unions or domestic partnerships.²⁹ The marriage equation operates differently for same-sex couples than different-sex couples. As described above, for different-sex couples, gender norms work together with substantive marriage law to encourage specialization. For same-sex couples, by contrast, a decision to specialize into breadwinning or caregiving roles means that at least one member of the couple is going “against” gender norms. Accordingly, same-sex marriage can serve as a natural experiment to pull apart the marriage equation to better understand the relative significance of each factor in how couples make decisions.

A. STUDIES OF GAY AND LESBIAN COUPLES THAT PREDATE MARRIAGE

Several studies of lesbian and gay couples using data that *predate* legal marriage found that same-sex couples divide housework and parenting responsibilities much more equally than different-sex couples.³⁰ As one researcher put it, “Although members of gay and lesbian couples do not divide household labor in a perfectly equal manner, they are more likely than members of heterosexual couples to negotiate a balance between achieving a fair distribution of household labor and accommodating the different interests, skills, and work schedules of particular partners.”³¹ For example, a detailed study of same-sex couples who had formed civil unions in Vermont found that same-sex couples with significantly different incomes not only divided housework more equally than different-sex couples with significantly different incomes, but also more equally than different-sex couples with similar incomes.³² Studies of gay and lesbian parents likewise find that they share childcare responsibilities considerably more equally than different-sex parents.³³ Although studies document that some gay and lesbian couples do specialize into breadwinning and caregiving roles,³⁴ the vast majority of research suggests that both the ideal and the typical experience is relatively equal sharing.³⁵

Citing such findings, some academic researchers and writers in the popular press have suggested that gay and lesbian couples may be a model for different-sex couples struggling to equalize home and work responsibilities.³⁶ There is potential here, but it may be illusory. These claims overlook a key factor: the studies compare heterosexual married couples to same-sex couples in (non-marital) long-term relationships. These differ in two significant ways. The first, and the one that has been the focus of the studies, is obviously whether the members of the couple are of the same or different sexes. The second distinction is whether or not the couple is legally married. This latter factor is rarely considered significant in study design, and is often entirely ignored, but it could be quite important.

B. SAME-SEX MARRIAGE AS A NATURAL EXPERIMENT TO DISAGGREGATE THE MARRIAGE EQUATION

Nine jurisdictions currently permit same-sex couples to marry, thus removing the last significant sex-based classification from marriage law. Same-sex married couples around the country are now deciding: Will one husband drop out of the paid workforce to stay home with children while the other husband provides income? Will one wife focus on advancing her career while the other wife provides domestic support? The choices these couples make may well be different from those made by

same-sex *unmarried* couples because, as discussed above, substantive marriage law and related benefits laws both encourage couples to specialize into breadwinning and caregiving roles and offer at least some protection to dependent spouses if the relationship ends. Societal understandings of what marriage means, and the personal significance of making a formal long-term commitment to a partner, can likewise encourage specialization.

Same-sex marriage can thus serve as a natural experiment that disaggregates the marriage equation. There are at least two fruitful lines of study. One could compare labor allocation in married same-sex couples to labor allocation in cohabiting same-sex couples. Similar studies have found, as the analysis above suggests, that married heterosexual couples tend to specialize into breadwinning and caretaking roles more than cohabiting heterosexual couples. But researchers have long recognized that these studies may be distorted by a selection bias, in that different-sex couples who choose not to marry may do so in part because they seek greater autonomy. Same-sex couples, by contrast, often cannot marry because they are not permitted to under state law. This reality creates a natural “control” group that can mitigate selection bias—albeit, I believe, at the cost of fundamental civil rights.³⁷

Studies could also compare same-sex and different-sex married couples to explore the relative importance of marriage, as opposed to gender, in the choices couples make. Importantly, it is not (yet) possible to fully compare same-sex married couples to different-sex married couples because the federal Defense of Marriage Act (DOMA) denies same-sex couples the many federal benefits of marriage.³⁸ This means, among other things, that a same-sex couple cannot file their federal taxes as a married couple, is not eligible for Social Security spousal benefits, and cannot sponsor a spouse for immigration status. Additionally, while some states permit same-sex couples to marry, others have created alternative statuses such as civil unions or domestic partnerships that provide the rights and benefits of marriage but arguably less of the expressive value of marriage. As a matter of constitutional law and fundamental fairness, I believe same-sex couples in any state should have the freedom to marry. The current variability, however, offers the opportunity to design research that assesses the relative importance of state versus federal benefits of marriage and to delve down into the differences between the symbolic and substantive rights of marriage.

V. RECONSIDERING EQUALITY

A better understanding of the marriage equation could yield significant benefits. Consider, for example, debates over alimony reform. Before the 1970s, in many states alimony was sex-specific. It was generally limited to “innocent” wives whose divorces were granted upon a finding that their husbands were at fault, and thus continued the sex-specific requirement that husbands provide economic support to their wives within marriage. In the 1970s, alimony changed in two respects. First, under evolving understandings of the constitutional guarantee of equal protection, alimony could no longer be limited to dependent wives. But rather than simply making alimony sex-neutral, many states followed the Uniform Marriage and Divorce Act and replaced open-ended alimony with “maintenance,” generally short-term support provided to dependent spouses who are deemed unable to support themselves while they prepare to re-enter the paid workplace.³⁹ These reforms fit comfortably with the 1970s feminists’ efforts to remake marriage as a union of “equals.”

If gender roles had been restructured, and if other aspects of substantive marriage law that encourage specialization during the duration of the marriage had also been retooled, and particularly if other supports (such as publically-subsidized childcare, more generous parental leaves, or greater workplace flexibility) had been established such that women routinely participated in paid work on an equal basis with their husbands, these alimony reforms might have been considered both successful and fair. That did not happen. Rather, as discussed above, women continue to provide the bulk of caregiving within different-sex marriages; they are far more likely than men to drop out of the paid workforce entirely, to work part-time, or, even if working full-time, to prioritize caregiving over taking full advantage of their earning power. Although equitable distribution of marital property can partially compensate for such realities, many divorcing couples have very little marital property; their greatest

asset is often the primary wage-earner's income. Additionally, upon divorce, women are far more likely than men to be granted sole or primary physical custody of children, and accordingly family responsibilities continue to compromise their ability to maximize their wage-earning potential. The combined effect of these various factors means that, not surprisingly, women's standard of living after divorce often falls dramatically, while men's typically declines modestly or even improves.⁴⁰

Changing one aspect of the marriage equation (sex-based open-ended alimony eligibility) without changing others (gender norms that expect women to be primary caretakers and tax, benefit, and other substantive marriage laws that encourage specialization) upsets the previous balance. Divorced women, as a group, are probably not worse off under the current regime than they would have been under the prior alimony regime, but they certainly did not benefit as much as they might have from other reform approaches that more accurately gauged, or accepted, the competing incentives embedded in the marriage equation.

The potential that same-sex marriage offers to better understand the extent to which marriage law itself may encourage specialization can dramatically change the conversation regarding whether and how to compensate a dependent spouse in the event of divorce. It will be many years before we have a sufficient body of data, and analysis of such data, to make credible statements regarding general patterns. That said, broadly speaking, two potential findings may emerge. One is that, notwithstanding marriage, same-sex couples continue to share responsibilities on the home and work front relatively equally. This would suggest that gender norms are the key factor in different-sex couples' specialization, and that current reform efforts centered on reshaping or accommodating gender norms are the appropriate mechanism to address the ongoing imbalance.

The other potential result is that upon being permitted to marry—particularly if DOMA is repealed or overturned—same-sex married couples will begin to specialize just as different-sex couples do. Such findings would help isolate the role that marriage law, along with personal and societal understandings of marriage, plays in the choices couples make. Such findings could expose a disconnect in a structure of marriage law that encourages specialization during marriage but that, upon divorce, treats such specialization as an individual choice for which the dependent spouse must bear the brunt of the consequences.

If one embraces a normative ideal of marriage as a partnership in which spouses equally share responsibilities for breadwinning and caretaking, such findings would suggest that reforms should focus on modifying or, more provocatively, dismantling the law and benefits that flow from marriage itself. Some might argue, however, that the advent of same-sex marriage also invites reconsideration of the normative vision of equality within marriage. Perhaps, rather than idealizing a marriage in which both spouses equally share breadwinning and caregiving responsibilities, it is appropriate to accept and expect a certain level of specialization in many marriages. Such an approach would call for more robust protections for a spouse who does such caregiving and more flexible workplace policies to accommodate it. In the past, it would have been almost impossible to disaggregate such a statement from gender-based assumptions regarding which parent would play the caretaking role. And some policymakers and theorists would likely reject such a vision of equality out-of-hand because they assume that it would perpetuate the inferiority and subordination of women. This is a valid concern. Domestic roles are still little valued in our society and are still largely filled by women. However, policies crafted today or in the future to accommodate caregiving within families are necessarily different from the sex-specific responsibilities of wives that they replace. The simple reality of same-sex married couples, as well as the relatively small number of different-sex couples in which it is the husband, rather than the wife, who drops out of or minimizes participation in the paid workplace, changes the story.

NOTES

1. This essay is adapted from a fuller exploration of these ideas in an article titled *Changing the Marriage Equation* that will be published in the *Washington University Law Review* in Spring 2012.

2. Benoit Denizet-Lewis, *Young Gay Rites*, N.Y. TIMES MAG., Apr. 27, 2008, at 28.

3. See, e.g., Jill Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 845–48 (2004) (discussing sex-specific support obligations at common law and their persistence in the necessities doctrine).

4. See, e.g., Allan Carlson, *Rise and Fall of the American Family Wage*, 4 U. ST. THOMAS L.J. 556, 562–66 (2006) (discussing prevalence of the family wage).

5. HENRY FORD, MY LIFE AND WORK 123 (1922) (quoted in Carlson, *supra* note 4, at 563).

6. See, e.g., *Califano v. Westcott*, 443 U.S. 76 (1979) (making the Aid to Families with Dependent Children, Unemployed Father program of the Social Security Act, which previously applied only to fathers, apply to either parent); URBAN INST., SOCIAL SECURITY: OUT OF STEP WITH THE MODERN FAMILY 7 (2000) (describing the sex-specific origins of spousal benefit in social security).

7. 29 U.S.C. § 206(d) (2006); 42 U.S.C. §§ 2000e to 2000e-17 (2006).

8. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979) (holding sex-specific alimony statute unconstitutional); *Stanton v. Stanton*, 421 U.S. 7 (1975) (holding statute requiring child support for boys until age twenty-one but girls only until age eighteen unconstitutional).

9. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 16 Table 6 (2009), available at <http://www.bls.gov/cps/wlf-databook-2009.pdf>.

10. See Suzanne M. Bianchi & Sara B. Raley, *Time Allocation in Families*, in WORK, FAMILY, HEALTH & WELL-BEING 23 (Suzanne M. Bianchi et al. eds., 2005); see also Mylene Lachance-Grzela & Genevieve Bouchard, *Why Do Women Do the Lion's Share of Housework? A Decade of Research*, 63 SEX ROLES 767, 768 (2010) (collecting studies).

11. See, e.g., Michael Kimmel, *Has a Man's World Become a Woman's Nation?*, in THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING 322 (Heather Boushey & Ann O'Leary eds., 2009), available at http://www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation.pdf (reporting that younger men on average spend three hours a day on work days with children under the age of thirteen and women on average spend 3.8 hours).

12. ARLIE RUSSELL HOCHSCHILD, WITH ANNE MACHUNG, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989).

13. See KARINE MOE & DIANNA SHANDY, GLASS CEILINGS & 100-HOUR COUPLES: WHAT THE OPT-OUT PHENOMENON CAN TEACH US ABOUT WORK AND FAMILY 52–57, 63 (2010).

14. GARY S. BECKER, A TREATISE ON THE FAMILY 30–53 (1981, enlarged ed. 1991).

15. *Id.*

16. See, e.g., Sarah Thébaud, *Masculinity, Bargaining, and Breadwinning: Understanding Men's Housework in the Cultural Context of Paid Work*, 24 GENDER & SOC'Y 330, 332 (2010).

17. See, e.g., Michael Bittan et al., *When Does Gender Trump Money? Bargaining and Time in Household Work*, 109 AM. J. SOC. 186 (2003); Julie Brines, *Economic Dependency, Gender, and the Division of Labor at Home*, 100 AM. J. SOC. 652 (1994); Theodore N. Greenstein, *Economic Dependence, Gender, and the Division of Labor in the Home: A Replication and Extension*, 62 J. MARRIAGE & FAM. 322 (2000); Thébaud, *supra* note 16.

18. See, e.g., Stephanie Hunter McMahon, *To Have and to Hold: What Does Love (of Money) Have to Do with Joint Filing?*, 11 NEVADA L.J. 718, 719–20 (2011).

19. See Lily Kahng, *One is the Loneliest Number: The Single Tax Payer in the Joint Return World*, 61 HASTINGS L.J. 651, 662 (2010).

20. A married couple in which one spouse earns twice the national average wage and the other spouse does not engage in paid work collectively receive \$100,000 more in Social Security benefits over a typical lifetime than a married couple in which each spouse earns the national average wage. See Eugene Steuerle et al., Urban Inst., *Does Social Security Treat Spouses Fairly?* (1999), available at <http://www.urban.org/publications/309257.html><http://www.urban.org/uploadedPDF/Straight12.pdf>.

21. See Noah Zatz, *Revisiting the Class Parity Analysis of Welfare Work Requirements*, 83 SOC. SERV. REV. 313 (2009).

22. See Gregory Acs & Elaine Maag, *Irreconcilable Differences? The Conflict between Marriage Promotion Initiatives for Cohabiting Couples with Children and Marriage Penalties in Tax and Transfer Programs*, in NEW FEDERALISM: NAT'L SURVEY OF AM.'S FAMILIES, at 2 (Urban Inst. Ser. No. B-66); Zatz, *supra* note 21, at 328.

23. Cf. Nada Eissa & Hilary Williamson Hoynes, *Taxes and the Labor Market Participation of Married Couples: The Earned Income Tax Credit*, 88 J. PUB. ECON. 1931, 1932 (2004) (finding EITC increases single mothers' employment but decreases married mothers' employment).

24. See, e.g., 23 PA. CONS. STAT. ANN. § 3502(a) (West 2010).

25. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

26. See, e.g., *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

27. See, e.g., Betsey Stevenson, *The Impact of Divorce Laws on Marriage-Specific Capital*, 25 J. LAB. ECON. 75 (2007) (collecting and reviewing studies).

28. As of February 2012, Connecticut, the District of Columbia, Iowa, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington have legalized same-sex marriage, and California, Delaware, Hawaii, Illinois, Nevada, New Jersey, Oregon, and Rhode Island have state laws providing the equivalent of spousal rights to same-sex couples within the state. See Human Rights Campaign, *Marriage Equality & Other Relationship Recognition Laws*, (updated July 6, 2011), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf. 2012 Wash. Ch. 3, 2011 Wa. S.B. 6239 (effective June 7,

2012); 2012 Md. H.B. 438 (effective Jan. 1, 2013, or upon resolution of certain disputes relating to any referendums on the Act).

29. *New Estimate of 50,000 to 80,000 Married Same-Sex Couples in the U.S.*, Williams Institute Press Release, The Williams Inst. (Feb. 24, 2011), available at <http://williamsinstitute.law.ucla.edu/press/releases/new-estimate-of-50000-to-80000-married-same-sex-couples-in-the-us/>.

30. See, e.g., Letitia Anne Peplau & L.R. Spalding, *The Close Relationships of Lesbians, Gay Men, and Bisexuals*, in CLOSE RELATIONSHIPS: A SOURCEBOOK 111 Clyde Hendrick and Susan H. Hendrick. (2000); Letitia Anne Peplau & Adam W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 ANN. REV. PSYCHOLOGY 405 (2007); Mally Shechory & Riva Ziv, *Relationships between Gender Role Attitudes, Role Division, and Perception of Equity among Heterosexual, Gay and Lesbian Couples*, 56 SEX ROLES 629, 630 (2007) (all collecting studies).

31. Lawrence A. Kurdek, *What Do We Know About Gay and Lesbian Couples?*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 251, 252 (2005).

32. See Sondra E. Solomon et al., *Money, Housework, Sex and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 572 (2005).

33. There are several studies of lesbian parents that find relatively equal sharing of childcare responsibilities. See, e.g., Timothy J. Biblarz & Everen Savci, *Lesbian, Gay, Bisexual, and Transgender Families*, 72 J. MARRIAGE & FAM. 480, 487 (2010); Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 J. MARRIAGE & FAM. 1052, 1054 (2000); Letitia Anne Peplau & Adam W. Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 ANN. REV. PSYCHOL. 405, 415 (2007) (all collecting studies). Studies of gay male parents are far less common, but have found similar results. See, e.g., SUZANNE JOHNSON & ELIZABETH O'CONNOR, *THE GAY BABY BOOM* 155–58 (2002) (finding childcare shared relatively equally, although not perfectly equally); Biblarz & Savci, at 487 (collecting studies showing relatively equal sharing of childcare responsibilities).

34. See, e.g., CHRISTOPHER CARRINGTON, *NO PLACE LIKE HOME: RELATIONSHIPS AND FAMILY LIFE AMONG LESBIANS AND GAY MEN* (1999); Jordan B. Downing & Abbie E. Goldberg, *Lesbian Mothers' Constructions of the Division of Paid and Unpaid Labor*, 21 FEMINISM & PSYCHOL. 100 (2011); Mignon R. Moore, *Gendered Power Relationships among Women: A Study of Household Decision Making in Black, Lesbian Stepfamilies*, 73 AM. SOC. REV. 335 (2008) (all documenting aspects of specialization within gay and lesbian relationships).

35. See, e.g., Charlotte J. Patterson et al., *Division of Labor Among Lesbian and Heterosexual Parenting Couples: Correlates of Specialized Versus Shared Patterns*, 11 J. ADULT DEV. 179, 183 (2004).

36. Solomon et al., *supra* note 32, at 572; Lisa Belkin, *The Way We Live Now—What's Good for the Kids*, N.Y. TIMES MAG., Nov. 8, 2009, at MM9; Tara Parker Pope, *Gay Unions Shed Light on Gender in Marriage*, N.Y. TIMES, June 10, 2008.

37. See Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2010) (arguing equal access to civil marriage is constitutionally compelled by the fundamental rights branch of equal protection law unless states stop performing civil marriages entirely); Deborah A. Widiss et al., *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J. L. & GENDER 461 (2007) (arguing unconstitutional sex stereotypes underlie the denial of marriage rights to same-sex couples).

38. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

39. See Uniform Marriage and Divorce Act, § 308, 9A U.L.A. 347–48 (authorizing awards only upon a showing of need and inability to support oneself through employment). Although the UMDA does not statutorily impose time limits, some states do. See, e.g., IND. CODE ANN. § 31-15-7-2 (2011) (generally able-bodied spouses may receive no more than three years of maintenance).

40. See, e.g., Patricia A. McManus & Thomas A. DiPrete, *Losers and Winners: The Financial Consequences of Separation and Divorce for Men*, 66 AM. SOC. REV. 246, 246 (2001) (“A large body of research has established that marital disruption has a substantial negative impact on women’s standard of living, and that this impact is worse for women than for men.”); *id.* at 265–66 (“women and children . . . overwhelmingly suffer serious declines in their material well-being in the aftermath of separation or divorce”).

Deborah Widiss is an associate professor of law at the Indiana University Maurer School of Law. Her research focuses on employment law, family law, and the significance of gender and gender stereotypes in the development of law and government policy. Her work has appeared in leading law reviews, including the University of Pennsylvania Law Review, the Texas Law Review, the Notre Dame Law Review, and the Harvard Journal of Law and Gender. In 2009, she was a winner of the Association of American Law Schools' Outstanding Scholarly Paper Award, which recognizes excellent scholarship by junior faculty; in 2008, she was honored with a Dukeminier Award from the Williams Institute at UCLA School of Law, which recognizes the best sexual orientation and gender identity law scholarship published in the previous year. This essay is adapted from an article titled Changing the Marriage Equation that will be published in the Washington University Law Review in Spring 2012.